

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO MUNOZ,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 239930

St. Clair Circuit Court

LC No. 01-000950-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520(d)(1)(a) (sexual penetration with a person between the ages of thirteen and sixteen). He was sentenced to seven to fifteen years' imprisonment. We affirm.

Defendant first argues that he was denied his right to a fair trial by the admission of improper other acts evidence, including a domestic violence conviction, probationary status, and outstanding arrest warrants for failure to pay child support. We disagree.

Defendant waived appellate review concerning disclosure to the jury of the domestic violence conviction because he voluntarily placed this other act into evidence. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001); *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

With regard to the prosecutor's cross-examination concerning defendant's probationary status and drinking, we conclude that any error was harmless. The information added little to what the jury already knew or could infer from defendant's volunteered testimony regarding the domestic violence. Further, in light of this volunteered testimony, defendant's admission that he provided alcohol to the minor victim, and the evidence of defendant's guilt, we conclude that the testimony did not affect the outcome of the trial. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

Regarding the prosecutor's cross-examination concerning defendant's outstanding arrest warrants for child support, we find no trial court error because the court sustained defendant's objection. To the extent the prosecutor improperly persisted, we conclude defendant was not prejudiced because little, if any, additional information was provided.

Defendant next argues that the trial court erred when it denied defendant's request to instruct the jury on CSC IV as a necessarily lesser offense of CSC III. We disagree.

We review questions of law de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). Our Supreme Court has recently held that MCL 768.32(1) contemplates jury instructions only on necessarily included lesser offenses, not on cognate lesser offense, and only when a rational view of the evidence would support a conviction of the lesser offense. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Our Supreme Court has also held that because CSC I requires sexual penetration, which can be for any purpose, and CSC II requires sexual contact, which is "contact that can reasonably be construed as being for the purpose of sexual arousal or gratification," and thus requires proof of an intent not required by CSC I, CSC II is a cognate lesser offense of CSC I, not a necessarily included offense. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). The same rationale would apply to the distinction between CSC III and CSC IV in the instant case. Thus, under *Lemons* and *Cornell*, no instruction on CSC IV was required.

Defendant last argues that he was denied effective assistance of counsel by numerous errors of his trial counsel. We disagree.

To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's representation "fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *Knapp, supra* at 385. A defendant must affirmatively show that counsel's objectively unreasonable representation was so prejudicial that the defendant was deprived a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant bears the burden of overcoming the presumption that counsel's challenged action could be considered sound trial strategy. *People v Stammer*, 179 Mich App 432, 438; 446 NW2d 312 (1989).

Defendant's argument is based on five asserted failings on the part of his trial counsel: (1) failure to file a motion to suppress defendant's prior inconsistent statements to the police; (2) failure to conduct a meaningful voir dire; (3) failure to prepare defendant to testify; (4) failure to timely object to the admission of defendant's criminal record or ask for a cautionary instruction or a mistrial; and (5) failure to object to the prosecutor's repeated misconduct during closing argument.

There is no evidence that the prior statements defendant gave to the detective were coerced or involuntary; rather, there was evidence that defendant was properly read his *Miranda*<sup>1</sup> rights before he was questioned. The mere fact that defendant had an alcohol problem does not support that his statement was involuntary. Defendant has shown neither deficient performance nor prejudice. The same is true of defendant's claim that counsel was ineffective in the conduct of voir dire. Defendant has not shown that the questioning of the potential jurors was inadequate to secure a fair trial.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant's claim that counsel was ineffective in failing to prepare him to testify also fails. The only support defendant offers for his argument is his claim that he was simply told to "tell the truth" when testifying, but was not told how to respond to questions regarding inadmissible matters. While counsel may have prepared defendant better, we find no ineffective assistance, and conclude it is unlikely that better preparation would have altered the verdict.

Regarding counsel's failure to request a cautionary instruction or mistrial, there is no reason to assume that counsel's decision not to ask for special instructions was anything other than an attempt to keep the jurors' attention away from that evidence. Further, it is unlikely that a request for a mistrial would have been granted.

Defendant also claims that his trial counsel's failure to object to the prosecution's closing argument deprived him of the effective assistance of counsel. We agree that the prosecutor's statements in closing argument went too far, and can see no sound strategy in counsel's failure to object. Nevertheless, we are satisfied that the jury did not base its decision on the conclusion that defendant was a "bad man," but rather, on the conclusion that the evidence supported a finding that defendant sexually penetrated the victim.

Thus, we conclude that defendant's claim of ineffective assistance of counsel has not been established.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Helene N. White  
/s/ Pat M. Donofrio